

No. 16-15172

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CORNELE A. OVERSTREET, Regional Director of the Twenty-Eighth  
Region of the National Labor Relations Board, for and on behalf of the  
National Labor Relations Board,

*Petitioner–Appellee,*

v.

SHAMROCK FOODS COMPANY,

*Respondent–Appellant.*

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On Appeal from the United States District Court  
for the District of Arizona  
No. 2:15-cv-01785-DJH  
The Honorable Diane J. Humetewa

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**Appellant’s Further Excerpts of Record**

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# Excerpt 1

PX 58

SHAMROCK FOODS COMPANY

28-CA-150157

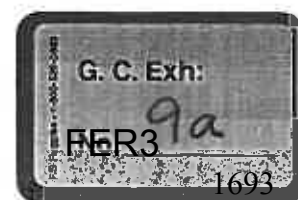
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1 UNIDENTIFIED MALE: So here's the -- here's the skinny.  
2 All right? We're going to continue with our union education  
3 meeting. All right? So that way you folks understand -- know  
4 the essentials. We'll continue with the education meetings  
5 because members of our team, our associates here, your peers,  
6 are still being approached, to a point where they're now  
7 uncomfortable, heading up to see Brian and myself about  
8 questions that some of the guys that are organizing are  
9 bringing up to them. All right?

10 So as long as that happens, we're going to continue to  
11 throw out some education out there. Not for them to take my  
12 word for it, take Brian's word for it, or anybody's word for  
13 it. Do the research. Go out there and do the research.

14 This week a couple guys have been approached with some  
15 specifics. But understand these concerns by our associate and  
16 our peers are specific to them, very, very specific to them.  
17 So to have somebody speak on their financial affairs is  
18 concerning to them. All right?

19 Might not be the men in your group. We have a manager at  
20 the meat plant being approached. All right? So that was  
21 brought up as well. So we kind of have some ideas. All right?  
22 Of who's out there. The more concerning is that they're  
23 approaching our guys during work hours; during work time, floor  
24 time. Work hours is for work. Work time is for work.

25 If they approach you in -- on your break outside from

1 here, perfectly fine, but work time is for work. The concern  
2 is, hey, you guys might watch me on the video and saw that guy  
3 next to me. I don't want to be part of it. I understand it.  
4 I totally understand it, right?

5 We don't do any surveillance on any kind of videos. Brian  
6 don't sit there all day and say, Hey, look (indiscernible) is  
7 talking to (indiscernible). Brian's over there drinking a cup  
8 of coffee with Frank talking. They don't do all those things,  
9 right? They don't --

10 UNIDENTIFIED MALE: Frank's sleeping.

11 UNIDENTIFIED MALE: Frank and Frank are out there  
12 sleeping. No, they don't do those things, right? They don't  
13 do those things, so that was his concern. I don't want you  
14 guys to associate me with somebody I don't want to be  
15 associated with, and are valid concerns. All right?

16 The question was am I going to lose my job when the union  
17 gets in here because the organizer told me so? The answer to  
18 that is no. Arizona is a right to work state, and the right to  
19 work principles affirms you a job. That you can -- you can  
20 work for a living and maintain a job.

21 Things that you're subject to are similar things that you  
22 get fired for anywhere. Attendance policy, if you don't show  
23 up to work, show up to work drunk, show up to work late, go  
24 home early, all those things. We understand that it's not  
25 specific to Shamrock, but to any other job that you're out

1 there. All right?

2 So they won't understand that, but they're scared about  
3 that. If I don't want to sign, what should I say to these  
4 guys? Tell them no. Tell them hell no. Tell them get out of  
5 my way if you don't want to be associated with. But if you  
6 don't say something you're going to continue to be approached.

7 So as long as there's an interest you're going to be  
8 approached. So those are some of the -- some of the  
9 information that I'm telling these guys. Tell them no, you  
10 won't be part of it. Raise your hand, say, hey, man, this guy  
11 is bugging me, you know. But that's you. That's -- you  
12 have to be comfortable to do that.

13 So they're comfortable to come in to me with some of their  
14 concerns. Some of their concerns is, hey, am I going to make  
15 more than what I'm making right now. Tell them to show it to  
16 you. Put it down on paper. I just review all the basics for  
17 today this week. It's a perfect time to be in receiver and a  
18 forklifter, perfect time.

19 From my 19 years of service here at Shamrock, this is the  
20 perfect time for somebody to be a forklifter or a receiver.  
21 The amount of money that's out there, tell them show it to you.  
22 Don't put your -- don't put your financial affairs on somebody  
23 else.

24 The people that are organizing it here have an agenda.  
25 Everybody has an agenda, so don't believe me. Don't believe



# Excerpt 2

PX 56

1 MR. DAWSON: Not quite, yeah, we're -- we -- but we should  
2 be, you know, momentarily.

3 JUDGE WEDEKIND: I guess we'll just go back off the  
4 record.

5 (Off the record at 10:12 a.m.)

6 JUDGE WEDEKIND: Good afternoon, you may have a seat.

7 THE WITNESS: Thank you.

8 JUDGE WEDEKIND: All set?

9 MS. DEMIROK: Yes.

10 JUDGE WEDEKIND: Okay. Back on the record. All right.  
11 Next witness?

12 MS. INESTA: Good morning, Your Honor, Respondent would  
13 like to call Dave Garcia.

14 JUDGE WEDEKIND: All right. Mr. Garcia, could you raise  
15 your right hand for me?

16 Whereupon,

17 **DAVID GARCIA**

18 having been duly sworn, was called as a witness herein and was  
19 examined and testified as follows:

20 THE WITNESS: I do.

21 JUDGE WEDEKIND: Thank you very much. Please say your  
22 name and spell it for us?

23 THE WITNESS: David Garcia, D-A-V-I-D, and then, G-A-R-C-  
24 I-A.

25 JUDGE WEDEKIND: Great, thank you.

1 A No, I do -- do not recall the date.

2 Q Okay. Do you remember the month that the conversation  
3 took place?

4 A I do not remember the month.

5 Q Okay. And do you recall what happened that resulted in  
6 that conversation?

7 A The conversation was -- resulted in --

8 MS. OVIEDO: Objection. Foundation.

9 JUDGE WEDEKIND: Foundation, okay, what's missing?

10 MS. OVIEDO: He said that he doesn't remember when or  
11 anything.

12 JUDGE WEDEKIND: Well, that's --

13 THE WITNESS: Every day's almost the same at Shamrock.

14 JUDGE WEDEKIND: -- okay. I -- overruled.

15 Q BY MS. INESTA: Okay. Do you remember what happened that  
16 resulted in the conversation -- the conversation you had with  
17 Mr. Lerma regarding the clipboard?

18 A Yes.

19 Q And -- and what had happened that day?

20 A Mr. Lerma was on break, his clipboard was on the fork -- a  
21 Shamrock owned forklift, on the -- on the clipboard was his  
22 copy of that night's schedule.

23 Q Uh-huh.

24 A I looked at the schedule, I was reviewing it, possibly  
25 having to tweak it and Mr. Lerma saw me looking at his -- at

1 the clipboard.

2 Q When you -- so how did you know -- I'm sorry, strike that.

3 What was the reason that you were looking at the schedule?

4 A Well, on a nightly basis I have to shuffle my guys around  
5 depending on what areas are heavier than others that -- I might  
6 assign a guy to an aisle that's not very busy at that point and  
7 another is pretty much overloaded, so I need to shuffle my guys  
8 during the night, sometimes two or three times at night. So  
9 looking at the schedule I'm kind of trying to stay ahead of the  
10 game by saying all right, I'll -- I'll move this guy over here  
11 because he's overloaded with work and that's why -- that's why  
12 I -- I move guys around according to where the work is.

13 Q Okay. And how often do you generally do this throughout  
14 the night?

15 A Probably about two or three times a night.

16 Q Okay. And when you picked up the clipboard did you know  
17 that it was Mr. Lerma's --

18 A I didn't know who --

19 Q -- clipboard?

20 A -- I didn't know whose it was.

21 Q Okay. And what caused you to pick up that -- that  
22 clipboard?

23 A Because I had to look at -- I had -- I wanted to look at a  
24 schedule to see where I needed to tweak and move around guys.

25 Q Okay. And -- and where exactly was the clipboard prior --

1 did you pick up the clipboard?

2 A Did I pick up the clipboard? Yes.

3 Q Okay. And what -- where was it that you picked it up  
4 from?

5 A Well, if you -- visualize a forklift there's an entrance  
6 here just like where I'm sitting, with the forks out here, the  
7 clipboard was laying just on top of the forklift just like  
8 this.

9 Q Okay.

10 A In plain sight. There wasn't a jacket, there wasn't  
11 anything on top of it, that's it, that's what --

12 Q Was -- and could you see what -- what the top page was  
13 that was clipped to the clipboard?

14 A The -- my schedule.

15 Q Okay. And did you look at any other documents in that  
16 clipboard?

17 A I don't even know if there was any -- other documents on  
18 the clipboard.

19 Q And did -- do you carry a clipboard around?

20 A No, I don't carry a clipboard.

21 Q Okay. Are schedules posted anywhere?

22 A Schedules are posted -- there's a schedule posted on an  
23 area we call a cross dock, yes.

24 Q Okay. And where you that you picked up the clipboard?

25 A I was completely on the other side of the fork -- I'm

1    sorry, the warehouse, completely on the other side of the  
2    warehouse.

3    Q     Okay. And where was the forklift parked that you saw the  
4    schedule on that you picked it up?

5    A     It was parked on the south end, just the very south end of  
6    the warehouse.

7    Q     Okay. And where there other forklifts parked there?

8    A     Yes, there were other forklifts there.

9    Q     Did you see any other clipboards with schedules on them?

10   A     No.

11   Q     Do you also have access to the schedule on a computer?

12   A     Yes, I do.

13   Q     And where would you have gone to get the information off  
14   of the computer?

15   A     At my desk.

16   Q     Okay. And where is your desk located?

17   A     My -- my desk was even further away than where the  
18   schedule was posted, it -- so if I wanted to look at it you'd  
19   have to even walk even further than I was.

20   Q     Okay. And when you -- did you have to move anything in  
21   order to pick up the clipboard?

22   A     No, not -- not at all.

23   Q     Do you remember seeing anything there when you picked up  
24   the clipboard?

25   A     Nothing.

1 Q Okay.

2 A Nothing but several forklifts there, a copy of the  
3 schedule that I needed to tweak and that was it.

4 Q Okay. And how long did you look at the schedule?

5 A Probably about 30 seconds, 45 seconds.

6 Q Okay. And did Mr. Lerma talk to you about your picking up  
7 the clipboard?

8 A Yes.

9 Q And how did that happen?

10 A He was coming around the corner out of the bathroom and he  
11 asked me what I was doing and I -- I told him that I was  
12 looking at tonight's schedule because I had to possible move  
13 some -- shuffle some guys around.

14 Q Okay. Did you say anything else to him?

15 A That was it.

16 Q Did he say anything else to you?

17 A No, he just -- just okay.

18 Q Okay. And did you have any other conversations with him  
19 that day regarding your looking at the clipboard?

20 A No.

21 Q Did you have any other conversations with him on any other  
22 day regarding your looking at the clipboard?

23 A The schedule?

24 Q The -- or the schedule, about that --

25 A No.



1 Q -- incident?

2 A No. No.

3 Q Did the clipboard have anything marked on it with Mr.  
4 Lerma's name?

5 A No, not at all, I -- not that I could see anyway.

6 Q Okay.

7 A I mean, I didn't turn the clipboard over, I didn't shuffle  
8 through it I looked at the schedule I -- it could've been  
9 anybody's clipboard and forklift for that matter.

10 Q Okay. Did the clipboard have any notation on it that said  
11 private or anything like that?

12 A Not -- none whatsoever, it was just a generic Shamrock  
13 issued, given clipboard.

14 Q Okay. Are you -- are you sure it was Shamrock issued?

15 A I'm pretty sure it was, yes.

16 Q Okay.

17 A They -- guys ask for clipboards all the time and the  
18 company provides them to -- to assist them in holding their  
19 papers together.

20 Q Okay. Did you ever tell Mr. Lerma that you were looking  
21 at his clipboard because you were looking for Union cards?

22 A No.

23 Q Did you ever tell Mr. Lerma that you had -- that with  
24 respect to the Union you were on -- you had been on both sides  
25 of the fence?

**Certificate of Service**

I hereby certify that I electronically filed the foregoing Appellant's Further Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 18, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 18, 2016

/s/ David B. Rivkin, Jr.  
David B. Rivkin, Jr.